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THE ART OF LAW-REPORTING.

The completion of four more volumes of the Indian Law Reports affords an occasion for an examination of the general principles of the art of law-reporting, and the particular methods adopted in these publications. The art of law-reporting consists in the selection, from the mass of cases decided by the Courts, of the comparatively few cases which in effect make new law, or will be useful in the solution of future legal problems; in the elimination from these cases of all matters which do not assist the objects for which they were selected; in presenting the residuum in a concise and intelligible form; and, lastly, in furnishing an exhaustive classification and index of the subjects dealt with.

The selection of cases is the most difficult of the reporter's tasks, since it requires not only that he should be a good lawyer, in order that he may appreciate to what extent, if any, a given case has altered and modified the law, but also that he should carefully examine the case to ascertain whether it will be an authority upon the point it deals with. A reporter should not, of course, refuse to report a case, because it is, in his opinion, bad law; (*a*) but if, upon examination, he finds that it is inconsistent with other authorities which were not cited to the Court, or was decided *per incuriam*, (*b*) he, or preferably the Central Editor originally contemplated by the founders of the Indian Law Reports, (*c*) should take the opinion of the Court as to whether the case should not be suppressed. A striking instance of the necessity for this examination is to be found in the current volume of the Madras Reports, (*d*) in a case of which

(*a*) See Proceedings of the Legislative Council, Vol. XIII, p. 84, *per Mr. Hobhouse*.

(*b*) See *Rama Reddi* v. *Appaji Reddi*, 1894, 818 M. 248, and the remarks thereon in *Thayar Ammal* v. *Lakshmi Ammal*, 1895, 18 M. 331, pp. 333, 338.

(*c*) *Proceedings of the Legislative Council* Vol. XIV, p. 21.

(*d*) *Sankaralinga Mudali* v. *Rathnasabbapati Mudali*, 1897, 21 M. 324, p. 326.

the head-note might well be "a serving officer may select the manner of serving process most convenient to himself, and such service is good service of process." This is, no doubt, the common practice of the mofussil, but it has been condemned by an authority which was not cited to the Court; (*e*) as well as by the authority which was cited and relied upon. The careful selection of cases by the Reporter, in collaboration with a Central Editor, and the submission of doubtful cases to the Court, would probably have kept out of the Reports many conflicting decisions, which may now follow one another at the interval of a few pages (*h*).

No case should be reported which merely applies an ascertained rule of law to a new combination of facts (*ee*); unless, as sometimes happens in the development of modern science and trade, the facts are so novel that the application of the old rule thereto is in fact a development of the law. This rather vague principle may be better expressed as a rule of practice:—"In deciding whether a case should be reported or not, first state the principle of the decision in abstract terms, without reference to the special facts of the case, and then ascertain whether this rule has been already authoritatively enunciated." In other words, before reporting a case try whether it is possible to write a decent head-note for it; and, though I am aware that the learned author of the Bombay Reports appears to be of a different opinion, I would submit that a head-note should state the *ratio decidendi* merely, and not consist of a précis of the facts, the authorities cited, and the judgments, occasionally enlivened with quotations from the last(*f*).

The application of this rule would prevent the multiplication of Reports dealing with the construction of particular documents; in such cases we often find the Court expressly declaring that it will look only to the intention of the parties, and that one document cannot be used to construe another; and the English Courts will often refuse to look at previous authorities, on a mere question of construction. And yet it is common enough to find in a head-note "Held, upon the construction of the mortgage-deed, the parties intended, &c."(*g*) Apparently the only reason for reporting the case

(*e*) *Cohen* v. *Nursing Dass Auddy*, 1892, 29 Cal. 201.

(*ee*) See 20 A. 307, 315, 447; 25 C. 824.

(*f*) See 22 B. 850, 862, 898.

(*g*) See 25 C. 246, and p. 248, *per Maclean*, C.J.

just referred to was that a similar case was cited, that is, that a former Reporter had sinned in a similar manner.(*gg*) Cases which merely follow another case should not be reported,(*h*) unless the latter be a decision of another High Court.

I venture to think that a case should never be reported on account of the *obiter dicta* of the Judges; they often cause serious difficulty when the question they deal with comes up for actual decision, and frequently have to be explained away or put on one side altogether. Take, for instance, the case of *Amrito Lall Dutt* v. *Surnomayi Dasi*(*i*), which occupies over thirty pages of the Reports. The appellate Court held, on the construction of a will, that a power to adopt had been given to the widow jointly with other persons, and there does not appear to have been any argument that such a power was valid. The case was decided on this point by two of the Judges, who expressly declined to go into another question, as to the validity of a direction to accumulate income; the judgments of the third Judge in the appellate court, and of the Judge in the Court below, on the latter point, were therefore mere *obiter dicta*, and the case is only an authority upon the construction of a particular will, and should, I think, have been omitted altogether. To report *obiter dicta* is to give to the Reports the functions of legal treatises, which was not apparently the intention of the founders of the Indian Law Reports. (*j*)

It is also not one of the functions of the Reports to direct the attention of a Court to its neglect of ordinary legal principles and methods; unfortunately it is often necessary that this should be done, but it would be more decently and effectually accomplished by a confidential official communication. Nevertheless, this appears to be the only reason for reporting a Privy Council decision which occupies nine pages of the Allahabad Reports,(*k*) and another case in the same reports, which decides that a Court shall not amend a decree, which has been drawn up in accordance with its own judgment, so as to make it inconsistent therewith (*l*). In the Calcutta Reports

(*gg*) See also 20 A. 103; 25 C. 816.

(*h*) See, however, 20 A. 781.

(*i*) 25 C. 662.

(*j*) See Proceedings of the Legislative Council, Vol XIII, pp. 63, 64.

(*k*) See 20 A. 209, p. 218.

(*l*) 20 A. 337.

there are several cases, of which the principal, if not the only, use is to inform a Sessions Judge that there is really a material difference in function between the Judge and the jury (*m*).

I have already indicated the form which should, in my opinion, be given to the head-note; but in the Indian, as in the English, Law Reports, the favorite form is a resumé of the facts followed by a short statement of the decision of the Court thereon. This form of head-note is often prepared by taking from the judgment, almost *verbatim et literatim* those portions which set out the general facts of the case, and the findings of the Court.(*n*) This practice virtually amounts to throwing the burthen of deducing the *ratio decidendi* upon the reader.

Moreover, the facts are usually stated with a particularity and detail which distract the reader's attention from the essential elements of the case.(*b*) In the case cited the material facts were that a mortgagee paid money in order to avoid a sale of the mortgaged property under a superior title, during the pendency of litigation between the mortgagee and the mortgagor, in which the question was whether the mortgagee had, in fact, any subsisting interest in the property, and in which it was subsequently determined that he had no such interest. The decision of the Court was that an interest contingent upon the uncertain event of the litigation being determined in the mortgagee's favour, was sufficient to sustain a suit by him for repayment of the money by the mortgagor. But the reporter informs us in his head-note of the nature of the mortgaged property, the amount of the mortgage-moneys, and the various stages, with the exact dates, of the litigation, in the High Court and the lower Court, between the mortgagee and the mortgagor. It may often be useful to supplement the abstract statement of the principle of the decision by a statement of the concrete facts dealt with by the Court, but the inclusion of irrelevant facts simply shows that the Reporter has been too lazy to master the case, and this, no doubt, is the explanation of the lengthy head-notes, extending frequently to a page of small print, sometimes to considerably more, which a long-suffering profession has to endure(*p*).

(*m*.) 25 C. 230; 361; 711.
(*n*) 20 A. 237; 22 B. 899
(*o*) *See* 25 C. 306.
(*p*) 22 B. 88, 833, 849, 861, 875, 899.
25 C. 354, 524, 425.
21 M. 310.
20 A. 103, 267, 482.

We come now to the body of the report, of which the first part should consist of a concise statement, as far as possible in chronological order, of the facts on which the judgment was based.

If the decision be that of an appellate Court, it is of no interest to the general reader to know the names or official designations of the Judges in the lower Courts, or the serial numbers by which the case was there distinguished; these matters, if thought material, should be placed in a foot-note, as is done in the Calcutta Reports. It would also be an advantage to the reader if the Reporter who is unable or unwilling to compile a succinct statement of the facts and arguments, were to print, once for all, at the beginning of his volume, a notice that "except where otherwise expressly stated, the facts and arguments in each case appear sufficiently for the purposes of the report from the judgment of the Court." This beautiful phrase has become stale by constant repetition in the Queen's Bench and Indian Law Reports, and is, in fact, of doubtful utility to any one but the Reporter.

Documents and pleadings should never be quoted *in extenso,* unless the precise words used are material; which in India, where pleading is informal and conveyancing unknown, can rarely be the case. The construction put upon any material document by the Court can usually be found shortly stated in the judgment, and can be stated as one of the facts of the case; the document itself and the argument by which the Court arrived at a particular construction may generally be omitted both from the statement of facts and the judgment itself. If, however, it is necessary to quote a document, only so much should be given as is absolutely necessary, and that should be printed in small type, and should not be again repeated in the judgment. For example, if the Court has held as a fact that a document is a usufructuary mortgage without a covenant to pay the mortgage moneys, it is not necessary to set out the document in full, or to exemplify the quaint pleading of the mofussil by reciting the whole plaint.(q) It is true that this method adds more than a page to the Reports, but that is another story. Neither is it necessary, in a case in which the questions are whether a grant of probate shall be made

(q) See 21 M. 476, and 25 C. 693, 694.

to a person as executrix according to the tenor, and on what portions of the estate the Administrator-General is entitled to charge commission, to set out a lengthy and informal holograph will and two codicils, which extend over more than *four* pages of small type.(*r*) The former question is, moreover, merely one of the intention of the testator, and should not have appeared in the report at all. Again, the utility of setting out the full text of the reference by a lower Court to the High Court is generally doubtful, but surely there can be no doubt of the absurdity of so doing in a case in which the High Court decided that the lower Court had no power to make the reference at all.(*s*) This is paralleled by the case in the Madras Reports cited above (*t*), which sets out a preliminary order of a Divisional Court remitting the case to the lower Court for findings of fact, occupying about three-fourths of a page, and also the order of reference to the Full Bench occupying about a page and a quarter; the former order is, of course, wholly irrelevant, and the latter is really *obiter dictum,* and contains a view of a previous case different from that taken by the Full Bench. It is also surely unnecessary to state that the Divisional Court passed a decree in accordance with the judgment of the Full Bench; if it did not, there would indeed be a case worthy of report. The statement that this purely formal procedure was duly followed is, however, repeated in the reports *ad nauseam.* A good example of the diffuse character of the reports is to be found in the report of a recent decision of the Privy Council (*u*), in which the principal question was whether a particular mortgage deed gave *post diem* interest, that is, a question of construction, and the question was also incidentally raised whether proceedings in Court stating the amount due on the mortgage fell within section 17 of the Registration Act, 1877. On the first point the case is valueless, except to call the attention of the Court below to the general principles upon which documents should be construed; the second point is dealt with in eight lines of the judgment. Nevertheless, the Reporter has filled ten pages with a statement of facts, the judgment of the High Court, and the entire judgment of the Privy Council

(*r*) 25 C. pp. 66—71. See also 22 Bom. 355, and 21 Mad. 310.

(*s*) 25 C. 488, 896.

(*t*) 21 M. 476, pp. 478—479.

(*u*) 20 A. 171, 172.

which sets out the exact terms of the mortgage-deeds and the history of the suit in the lower Courts. It would seem, in fact, that the judgments of the Court are reproduced *verbatim*, and are not edited at all, and this would appear to be a principal cause of the diffuseness of the Reports. Only that portion of the judgment should be given which deals with the point for the sake of which the case is reported, and the Reporter should also eliminate all recitals of the evidence, and the reasoning of the Court thereon. Also it is unnecessary to set out in full sections of common Acts quoted by the Court, such as a section of the Criminal Procedure Code (*v*), or the Tenancy Act (*w*), or quotations from reported cases (*x*), or common forms prescribed by the rules of Court (*w*). Every report should be submitted to the Court in proof, in order to avoid any slip on the part of the Reporter, and to enable the Court to correct any inaccuracy in the judgment thus edited.

The arguments of counsel should be stated, if possible, in logical order; each proposition advanced by them being followed by the cases cited in support thereof. A general statement that counsel referred to certain cases is a confession that the Reporter either did not hear the arguments, or did not understand them, and is of very little use to the reader. The references to all cases cited should be carefully verified, and the date of decision prefixed to each, as is now done in the English and Calcutta Reports.

The last task of the Reporter is to select the appropriate catch-words to place at the head of the report. They should consist of those words which would be chosen in making an index to the reports, and not of short sentences stating, more or less ungrammatically, the effect of the head-note (*y*). For the assistance of the Reporter, and to facilitate the preparation of the index, he should be furnished with a list of the titles, sub-titles, and cross-references which will be used in making the general index, similar to the list published in the English Law Reports Digest (*z*). From this list he should select the most general word for his first catch-word, and proceed from genus to species and sub-species until he arrives at the mere variety or sport of which the average reported case consists, and should

(*v*) 25 C. 215.
(*w*) 25 C. 216.
(*x*) 20 A. 55,
(*y*) 22 B. 961.
(*z*) Digest, 1865—1890, Vol. I, p. dcclv,

conclude with a reference to any statute or rule under which the Court has proceeded. For example, the catch-words to the case just referred to (y) should be "Practice—Execution—Arrest—Lunatic—Discretion of the Court—Civil Procedure Code (Act XIV of 1882), S. 33-A." The work of the index maker would thus be based on that of the Reporter, who has presumably carefully considered and analysed each case.

The index of cases should consist of the names of all the cases arranged in alphabetical order. This is so obviously the most convenient arrangement for a reader in search of a particular case that it is impossible for any one, not familiar with the inner working of the Indian Law Reports, to attempt to explain why the cases are arranged according to the several jurisdictions of the High Court; so that a reader who does not know whether the case he requires was decided by the Privy Council, a Full Bench, or on reference from a Small Cause Court, has to glance through perhaps a dozen or more separate indices. The Allahabad Reports, howevr, have now adopted a single index; and the indices of the cases cited in the Reports are, strange to say, always arranged alphabetically. The definite article does not, I may observe, furnish the proper index letter to a case (a).

The index of subject-matter will, of course, consist of the head-notes of the several cases arranged according to their most distinctive catch-words, with cross-references chosen from the other catch-wards. It is *not* necessary or expedient that the same head-note should be repeated several times in full (b); a cross-reference is generally sufficient. It is not pleasant to toil slowly through half of an involved head-note, and then to realise that it had already annoyed you a few lines above, on the same page.(c)

The form of the monthly numbers is not worthy of a Government publication. The system of printing the indices on one side only of very thin paper cannot lead to any appreciable saving of expense, and in the Bombay and Calcutta Reports is annoying;

(a) Allahabad Reports, May 1898.

(b) Indices to the Madras Reports, *passim.*

(c) Madras Reports, July 1898, p. iv: and three other cases in the same number, pp. iii and vii; iv and vi; v and vii. Compare Bombay Reports, November 1898, pp. iv, vii and xiii.

since the printed pages tend to adhere. The Bombay and Allahabad Reports are disfigured by advertisements printed on pages and inserted slips of the crudest colours, in a manner which would appear to have been copied from the trade catalogue of some provincial haberdasher. Sometimes portion of the reports is printed on a page of the same colour as the advertisement sheets.(*d*)

It is obviously desirable that the reports of cases should be published as quickly as possible, and that, after accuracy, the Reporter should aim at speed. In this respect the Allahabad Reports appear to excel the others; in the earlier numbers of 1898 the interval between decision and publication in these reports is about six months, in the later numbers about four months. In the Calcutta Reports, some cases are reported three months after the decision, and the average probably does not exceed six months. In the earlier numbers of the Madras Reports the majority of the cases are about six months old, but in the October and November numbers, curiously enough, there are batches of cases decided in August, November and December, and even earlier months, of 1897, which would increase the average considerably. The Bombay Reports lag far behind the others; the number for April 1898, for example, contained 13 decisions of 1896 and one only of 1897, and it is not until the August number is reached that the decisions of 1897 preponderate. The September number contains cases decided in July, August and September 1896, that is, more than two years previously. There is also often a delay of several weeks in the delivery of the numbers, especially in the case of the Allahabad reports, which should be considered in estimating the speed of Publication.

In the debates upon the Bill which resulted in the Indian Law Reports Act, 1895, it was assumed by Mr. (now Lord) Hobhouse that there would be a Central Editor who would revise the reports sent in to him, and return those which were defective for correction by the Reporter; and he observed that, "the whole thing depends very much on the relations of the Editor, the Reporters, and the Judges, which must be adjusted from time to time, perhaps at short intervals"(*e*). I do not know what period has elapsed since the last *adjustment*, but I venture, on this authority, to submit that the

(*d*) Allahabad Reports, February 1898.

(*e*) Proceedings of the Legislative Council, Vol. XIV, pp. 20, 21.

present condition of the reports shows the necessity of an arrangement under which a Central Editor would be invested with and exercise large powers of revision and control.

J. J.

CHAKKRA CHAPAN v. MOIDIN KUTTI 8 M. L. J., REP 231.

The decision of the Full Bench of the Madras High Court in the above case discloses an extraordinary degree of difference in the opinions of the learned Judges, which is unfortunate when we have regard to the importance of the point in dispute, and which is not justified by any unusual difficulty in the questions involved. Every Judge almost seems to differ from every other Judge to a greater or less extent, and we have considerable misgivings as to the manner in which each learned Judge will seek to give effect to the Full Bench rulings in cases in which the same question may arise before him. The case before the Full Bench was briefly this, whether an appeal lies to the High Court from the decision of a single Judge of that Court in a revision petition under S. 622 of the Code of Civil Procedure. Two questions were argued as arising for decision under the reference to the Full Court—(1) Whether the exercise of revisional powers under S. 622 is the exercise of appellate jurisdiction within the meaning of S. 15 of the Charter Act or whether such jurisdiction is neither original nor appellate, but of a class by itself, akin to the powers of superintendence possessed by the High Courts under S. 15 of the Charter Act. (2) Supposing that revisional jurisdiction is comprised in appellate jurisdiction, whether an appeal lies under S. 15 of the Letters Patent which provides an appeal against the judgments of a single Judge of the Court in its original or appellate jurisdiction, or whether Ss. 588 and 591 of the Code of Civil Procedure read together take away the appeal which undoubtedly would otherwise exist. We have dealt with the latter question at length on a former occasion (see 2 M. L. J. 343) and do not propose to make more than one or two observations at present, though we must make some remarks on the judgment of *Boddam* J., on the point. The former question was raised for the first time now in the Madras High Court, and has led to a difference of opinion between the learned Judges. *Subrahmania Aiyar*, *Benson*, and *Moore*, J.J., hold that revision is

a part of appellate jurisdiction. *Shephard*, O. C. J., on the other hand, is inclined to think that it is not, but he apparently thinks that the opposite view has prevailed so long that he defers to it, especially as in the Judicial Committee of the Privy Council itself, the question has not been raised, though occasions for doing so have arisen. *Boddam* J., preferred to give no opinion on the matter. *Davies*, J., however, has expressed a strong dissent in a somewhat lengthy opinion. The leading judgment in favour of the view that revision is a part of appellate jurisdiction is that of *Subrahmania Aiyar*, J., and the argument of the learned Judge is so convincing that we do not propose to add anything to it. He refers to *Navivahoo* v. *Turner*, L. R., 16 I. A., 156, where though the question, whether, revision, is a part of appellate work did not arise, their Lordships of the Judicial Committee do observe that there are only three heads of jurisdiction, ordinary original, extraordinary original and appellate. Their Lordships observe that "they are confirmed in this view by observing that in the next group of clauses (*i.e.*, clauses 19 to 21), which indicate the law to be applied by the Court to the various classes of cases, there is not a fourfold division of jurisdiction, but a threefold one into ordinary, extraordinary and appellate." We will not repeat the other arguments of *Subrahmania Aiyar*, J., but proceed to examine briefly the dissenting judgment of *Davies*, J.

As far as we can gather from the judgment of the learned Judge, it seems almost to be self-evident to him that 'revision' cannot come under the head of appellate jurisdiction. By the very words of S. 622 of the Code of Civil Procedure, the power of revision exists only where there is no appeal. Therefore, argues *Davies*, J., "revision is opposed to appeal instead of being comprised in appellate jurisdiction." Now there is no doubt that in the Code of Civil Procedure the word "appeal" is used in a limited sense, which 'excludes' revision. But nothing is more clearly established in the matter of construing statutes than that it should not be assumed that because a word is used in a certain sense in one statute, it is therefore used in the same sense in another statute, unless both statutes be in 'pari materia.' *Humble* v. *Mitchell*, 11 A and E. 205, see also Maxwell on Statutes, 2nd Ed., pp. 47, 48; *Dayachand Nemchand* v. *Hemchand Dharamchand*, I. L. R., 4 B., 515. Here the statutes undoubtedly are not in 'pari materia.' Moreover, one of the statutes was passed in England; where the word 'revision' is not used at all to denote the examination by a superior tribunal of the decision of an inferior tribunal, whatever be the

scope of such examination. If in the English law, the words 'revision' and 'appeal' were used in the sense that they are in the Indian Code of Civil Procedure, there would undoubtedly be force in Mr. Justice Davies' argument that 'revisional' cannot be a species of appellate jurisdiction. But since the word is not generally used in the English law, we think the learned Judge was not justified in importing into the English law the idea of revision in the restricted sense in which it is used in our Code of Civil Procedure. On the other hand the word "appeal" is often used in the general sense of the examination by a superior tribunal of the decision of an inferior tribunal. *Davies*, J., makes no answer to the argument of *Subrahmania Aiyar* J., that in speaking of the law to be administered by the High Court, the Letters Patent speak only of three jurisdictions—ordinary original, extraordinary original, and appellate, thus indicating that these embrace the whole of the High Court's jurisdiction, where it has to administer law, *i.e.*, to act judicially. Are we to suppose that, according to the Letters Patent, 'revision' is not a part of appellate jurisdiction, but that still, we are not told what law the High Court is to administer in revision? 'Revision is opposed to *appeal* only in the sense that one kind of 'appeal' is opposed to 'appeal' in the restricted sense in which that term is used in the Code of Civil Procedure.

The next argument of *Davies*, J., is that an appeal involves a re-hearing and a fresh judgment, while there is neither in revision, and the learned Judge says that the functions of the High Court in revision are confined to those of the High Court of Justice in England in the case of a writ of prohibition, mandamus, or certiorari, *i.e.*, quashing proceedings conducted without jurisdiction, directing a Court to try a case where it wrongly refuses jurisdiction, or directing a thing to be done over again. We are by no means prepared to subscribe to the view that the jurisdiction of the High Court in revision is as limited as the learned Judge attempts to make out. The Privy Council laid down no doubt in *Amir Hassan* v. *Sheo Baksh* I. L. R., 11 C., 6 that the High Court cannot interfere with the decision of a lower Court in revision under S. 622, Civil Procedure Code, merely becaue it has wrongly decided a question of law; but their Lordships certainly cannot be said to have laid down, that the revisional jurisdiction of the

High Court is confined to questions of jurisdiction, for that would be to expunge altogether the words, "or to have acted in the exercise of its jurisdiction illegally or with material irregularity." A Full Bench of Madras High Court has, in fact, laid down in *Krishtamma Naidu* v. *Chapa Naidu*, I. L. R., 17 M. 411, that the Court has power to revise even in cases when no question of jurisdiction arises. *Davies* J., himself decided in that case that errors of procedure could be corrected in revision where such errors are likely to have caused failure of justice. Another learned Judge held that when the judgment is perverse either with regard to substantive or processual law, the Court could interfere in revision. It is difficult to assimilate the powers of the High Court in revision to those exercised by the High Court in England in the case of the writs above referred to, though, no doubt the powers exercised in the case of such writs are included in the powers of revision. But even if they were similar, does it at all follow that there is no re-hearing in revision? With all deference to the learned Judge, we have no doubt that the High Court has full power in revision to pass a fresh judgment. The section lays down that the High Court "may pass such order in the case as it thinks fit." There is no reason for holding that this does not include the power of modifying the judgment of the lower Court and passing a fresh judgment and decree in the case. Suppose the Court holds that the lower Court had no jurisdiction to try a suit, has not the High Court the power to dismiss the suit? Should it direct the lower Court to do so? Or suppose the Court holds that jurisdiction was wrongly assumed over part of a subject matter of a suit, should it send back the case for a fresh judgment being passed? If such was the meaning, we think the Legislature would have used apt words to make it clear. We need hardly say that the view of the learned Judge is entirely opposed to the practice of the High Courts till now. The High Court has not hesitated to confirm, reverse or modify the judgments of the lower Court and pass its own decrees where it thought fit to do so. But supposing the High Court could not pass a definitive judgment finally disposing of the case, but has to direct the lower Court to do so, why should it be said, that such direction is not in itself a judgment, when it decides what the lower Court should do? In second appeals where the trial has been irregular and the question is one of fact, the High

Court cannot itself decide the question, but can only direct the lower Court to re-try the case in accordance with such directions as it may choose to give. And yet nobody has doubted that in such cases, the High Court does pass a *judgment*. It is even more difficult to understand the learned Judge, when he says there is no re-hearing in revision. When the High Court hears the case to see whether the lower Court has exercised a jurisdiction not vested in it by law, or whether it has failed to exercise a jurisdiction vested in it, or whether it has acted illegally or with material irregularity in the exercise of its jurisdiction, is not the High Court *hearing* the case? No doubt the whole case is not re-heard; but neither is it in a second appeal. The Court cannot try questions of fact on second appeal, and yet it is not doubted that the case is re-heard in second appeal. Why should it be said that there is no re-hearing in revision, simply because the scope of the hearing is even more narrow than in second appeals.

The next argument of the learned Judge is that it is in the interests of the public as much as in those of the individual that this power of control is given, and the Court may, therefore, act of its own motion under S. 622, which it cannot do in appellate matters. Here again it is very difficult to follow the learned Judge. How does it follow that, because the Court can act of itself its jurisdiction is not a species of appeal. We are not aware of any general principle that an appeal can only be at the instance of the party aggrieved. No doubt, in the sense in which it is used in the Civil Procedure Code, it must be so. We would repeat what we have already said, namely, that we have no business to assume that the word is used in the same sense in the Letters Patent, as in the Civil Procedure Code.

Again, the learned Judge observes that in S. 15 of the Charter Act the power of superintendence of the High Court (which according to the learned Judge includes the power of revision) over inferior Courts is grouped together with the power to call for returns and to make rules of practice and to prescribe forms, as well as the power to direct the transfer of a suit or appeal. "If", observes the learned Judge, "appellate jurisdiction be taken to denote the first-mentioned power, it would be difficult to say why it should not equally denote all the other powers mentioned in the section." At

first sight, the argument seems to have some force. But we cannot fail to notice that this section embraces judicial, quasi-judicial, legislative and executive or administrative powers. The power to call for returns is purely executive or administrative in its nature. The power to make rules of practice and to prescribe forms is of a legislative character. The power of transferring a suit or appeal is, we should say, judicial, as is the power to exercise superintendence over inferior Courts. We see no violence in classing the powers which are judicial in character under the appropriate head of the Court's jurisdiction. It is no reason against doing so that the section speaks of other powers which are not judicial at all. We have assumed that the power of superintendence does include the power of revision; and we do not think it necessary for our present purpose to examine whether this view is correct, though *Moore*, J., seems to think it is not, see however, *Tej Ram* v. *Har Sukh*, I. L. R., I A., 101, *in the matter of Lukhy Kant Bhose, Ib.* 1 C., 180. Supposing it does, that would not affect our argument as already observed. Moreover, there is no reason for saying that, because S. 15 of the Charter Act groups judicial powers with non-judicial powers which cannot be classed under appellate jurisdiction, the powers of the Court under S. 622 should be held not to come under the term appellate jurisdiction in the Letters Patent.

One more argument of *Davies*, J., remains to be dealt with. S. 36 of the Letters Patent enacts that any function which is hereby directed to be performed by the High Court in the exercise of its original or appellate jurisdiction may be delegated by the Court to any Judge or any Division Court by rules framed for the purpose. The learned Judge says "that it could hardly be argued that the power of making rules is one of the functions for which provision is made in cl. 36 of the Letters patent." We agree with the learned Judge; but S. 36 cannot include the power of making rules only, because such power is not judicial but legislative, and cannot, therefore, be a branch of the Court's judicial jurisdiction which alone can be classed under original and appellate jurisdiction.

We have now dealt with all the arguments of *Davies*, J., for showing that revisional is not part of appellate jurisdiction. We will only say one word more about his actual answer to the reference. Having come to the conclusion that the order of a Judge in revision is not

passed under the appellate jurisdiction of the Court, the learned Judge is of opinion that S. 15 of the Letters Patent is inapplicable and gives no right of appeal in such a case. But he holds that under the rules of the Madras High Court, a single Judge could not hear a revision petition after it had been once admitted and notice has gone to the counter-petitioner. Under the rules a Bench of two Judges should hear such cases. It is strange that the learned Judge should not have gone further and said that under S. 36 of the Letters Patent and S. 13 of the Charter Act, the High Court would have no power to make a rule delegating the hearing of revision petitions either to a single Judge or to a Bench of two or more Judges and either for admission or for final disposal if its power of revision is not a part of its appellate jurisdiction. *Davies,* J., himself points out that cl. 36 of the Letters Patent will not include the power of making rules under S. 15 of the Charter Act. How then could it include the power of revision if it is not a part of the appellate jurisdiction? The fact is that the result of the learned Judge's view would be, as pointed out by *Benson,* J., that the whole Court would have to sit to dispose of revision petitions and transfer petitions if they cannot be held to be a part of the Court's appellate jurisdiction. Can it be that before writing their judgments the learned Judges did not discuss the question with one another? Or how comes it that *Davies,* J., seems to hold that a Bench of two Judges may, according to his view of the case, dispose of a revision petition, while as pointed out by *Benson,* J., his opinion necessarily leads to the conclusion that the whole Court must hear revision petitions?

As we have already said, we do not propose to deal at length with the view of *Benson,* J., that S. 591, C. P. C., precludes an appeal against the decision of a single Judge in a revision petition. The learned Judge says that the reasons he gave for his opinion, in *Upadhyaya* v. *Visvaraja Tirthasami,* I. L. R., 20 M. 407, would be regarded as absolutely conclusive, but for an observation of their Lordships of the Privy Council in *Harish Chunder Chowdhry* v. *Kali Sundara Debia.* We do not hope to shake the confidence of the learned Judge by adding any fresh arguments to those we have already adduced in our previous article. But we would suggest one observation about the judgment of the learned Judge. Under S. 595,

C. P. C., an appeal lies to the Privy Council from any final decree or order of the High Court. But under S. 597 no appeal would lie to the Privy Council against the judgment of a single Judge. The result of Mr. Justice *Benson's* view is that when an order is passed by a single Judge of the High Court in an appeal under S. 588, C. P. C., or under S. 622, no appeal would lie to the Privy Council, which is against the provisions of S. 595, although an appeal would lie if the order were passed by a Bench of two Judges. To our mind this is conclusive against the view of the learned Judge. We admit that S. 591 read by itself is strongly in favor of his view. But the provisions of S. 595 and of the Letters Patent clearly show that S. 591 does not apply to orders passed by a Judge of the High Court.

We may be permitted also respectfully to demur to the manner in which *Benson*, J., disposes of the judgment of the Privy Council. There cannot be the slightest doubt that the ratio of the Privy Council decision is against the view of the learned Judge; and we do not think it is permissible to override the judgment by showing that the actual decision can be supported on other grounds than those on which it really proceeds.

We must say a word about Mr. Justice *Boddam's* judgment before we close. It is very difficult to understand it. The learned Judge says that against an order in a revision petition there would be an appeal, if the order amounts to a judgment. We perfectly agree. It cannot be contended that against a mere interlocutory order under S. 622 an appeal would lie. But the learned Judge proceeds to agree with *Benson*, J., in saying that S. 591, C. P. C., applies to orders under S. 622 passed by a single Judge. The learned Judge evidently did not perceive that in that case there would be no appeal in any case against an order under S. 622, whether it amounts to a judgment or not. He actually holds that in the particular case there was an appeal, because the order amounted to a judgment. It is impossible to resist the conviction that the learned Judge did not understand the judgment of his colleague Mr. Justice *Benson*.

Very recently a Bench of the Bombay High Court also has held in *Hiralal* v. *Bai Asi*, I. L. R., 22 B., 891 that there is no appeal against the order of a single Judge of the High Court refusing to

issue a rule *nisi* under S. 25 of the Provincial Small Cause Courts Act, which confers on the High Courts a discretionary power to interfere with judgments and orders of Small Cause Courts, or when they are not in accordance with law. One of the learned Judges proceeds on the ground that S. 13 of the Charter Act provides only for the exercise of original and appellate jurisdiction and does not deal with the revisional or extraordinary jurisdiction which is vested in the Court by S. 15 of the Act and by various Acts of the Legislature of this country. The learned Judge does not discuss the question at any length, but observes that to hold that there would be an appeal in such a case would lead to the inference that there would equally be an appeal from an order calling for a return or from any other act done in the performance of revisional or extraordinary jurisdiction. As we have already pointed out the error in this view is in not making a distinction between judicial and non-judicial or quasi-judicial orders. Under S. 15 of the Letters Patent an appeal is provided only against a judgment, and an order calling for a return is certainly not a judgment. *Ranade,* J., does not base his judgment on the same grounds as his colleague. He says that an order declining to issue a rule *nisi* is not a judgment and that the power conferred on the High Court by S. 25 of the Provincial Small Cause Courts Act is expressly stated to be discretionary in its nature, and that it, therefore, does not fall within the category of a judgment passed in the original or appellate jurisdiction of the Court. He observes that there is no precedent where any such appeal was allowed. The learned Judge's attention was apparently not drawn to the case of *Vencatta Reddi* v. *Taylor,* I. L. R., 17 M., p. 100 where *Muthusamy Aiyar* and *Best,* J.J., decided that an appeal would lie in such a case.

NOTES OF INDIAN CASES.

Debi Das *v.* Nirpat. I. L. R., 20 A. 365. In the case of a contract in favor of joint contractees and a suit by the surviving contractees for the recovery of the debt where some have died, the question has been raised as to the necessity for joinder of the representatives of the deceased. The High Courts of Allahabad, Bombay and Madras have decided in favor of the maintainability of the action by the survivors alone. But the argument in favor of the necessity for the joinder of the representatives also has been strongly put by the Bombay High Court

in *Motilal Bechardass* v. *Ghellabhai Hariram*, I. L. R., 17 B, 6. The logical position is that of the Calcatta High Court, though the Bombay Court adhered to the old practice before the Contract Act. See also *Vaidyanatha Ayyar* v. *Chinnasami Naik*, I. L. R., 17 M. 108.

Bansi Lal *v.* **Ramji Lal,** I. L. R., 20 A. 370. A point of considerable interest is dealt with in this case by *Knox, Acting Chief Justice* and *Banerji*, J. They hold that it is not competent to a defendant to seek to invalidate judgment between the same parties on the ground of fraud ; and that he can only do so by a separate suit. S. 44 of the Evidence Act, however, is very wide in its terms and though it is to be somewhat limited as inapplicable, to judgments obtained by collusion between the parties and to cases where the party impeaching was himself guilty of the fraud, we can see nothing in principle precluding its application where the fraud is set up by the defendant. The decision relied on *Karamali Rahimbhoy* v. *Rahimbhoy Habibhoy*, I. L. R., 13 B. 137 is no authority for the position taken by the learned Judges, though *Scott*, J., refers to English cases where it is laid down that a fraudulent judgment can be vacated only by review or by original bill. S. 44 of the Evidence Act, however, is explicit, and the defence of fraud would be open to a defendant so long as a suit to set aside a judgment has not become barred.

Shiam Behari Lal, *v.* **Rup Kishore,** I. L. R., 20 A. 379. A sale in excution of a decree was made by the Collector under the rules framed by Government under S. 320 of the Code. The sale was set aside for irregularity. The purchaser who was also the decree-holder brought the suit for a declaration that the sale was good.

The question is raised whether such a suit is maintainable. The last clause of S. 312 has no application, because the suit was not one to set aside an order passed under the section on the ground of irregularity. But the question remains whether a separate suit is contemplated where special provision is made dealing with irregularities. There is also an appeal provided by law under S. 588 of the Code. It is another matter where the sale is set aside upon grounds other than those mentioned in S. 311. We cannot suppose that it was intended that where a sale is set aside on the ground of irregularity in the publication or conduct of sale, it is open to the party affected by it to bring a regular suit to contest the order. See *Viraraghava Aiyangar* v. *Venkatacharyar*, I. L. R., 5 M. 217.

Nihali *v.* **Mittar,** I. L. R., 20 A. 446. The decision in this case follows the Calcutta decision in *Poresh Nath Mojumdar* v. *Ramjodu*

Mozumdar. I. L. R., 16 C. 246. When the time stipulated for redemption the decree has expired, the decree-holder is still entitled, according to the learned Judges, to make the payment and claim redemption, unless the order absolute has been made. The decisions in *Vallabha Valiya Rajah* v. *Vedapurratti*, I. L. R., 19 M. 249, and *Ram Lal* v. *Tulsa Kuar*, *Ib.* 19 A., 180, do not appear to have been brought to the notice of the Court. We are unable to see how the condition having failed, the decree-holder can still claim execution, unless the time is extended as provided by the Act.

Behari Lal *v.* **Muhamma Muttaki**, I. L. R., 20 A. 482.—It is impossible to doubt that Art. 134 of the Limitation Act is intended to refer to cases which are excepted in S. 10 of the Act. The Madras High Court has been of opinion that a mortgagee is not a purchaser within the meaning of the Article. But we think it ought to be understood in the sense of an alienee for consideration as the Bombay High Court has understood it. See *Attorney-General* v. *Davey*, 4 De J. and J. 136. Mr. Justice *Banerji* appears to us to have taken the right view. In the case of a mortgage by a preceding trustee, the possession by the mortgagee for a statutory period must give him a statutory title against the successor under Art. 144, if not under Art. 134.

Mul Chand *v.* **Ram Ratan**, I. L. R., 20 A. 493.—This case is an interesting application of the principle contained in S. 544 of the Code of Civil Procedure. Upon an appeal by the plaintiff, the appellate Court made an order of remand. Against this order one of several respondents, appealed and the remand order was set aside and the original decree restored.

The remaining defendants were not express parties to the appeal. The decision was on a common ground, and they took the benefit of the reversal. They could, of course, not execute the order of the High Court reversing the order of remand. The question, however, is whether they could not execute the decree of the original Court. Mr. Justice *Banerji* has held he could and, we think, the decision is a proper application of S. 544. The decree of the Court of last resort is, no doubt, the decree to be executed and to be amended under S. 206 in case amendment were needed. A person who was not by name a party to the decree of that Court is not precluded from executing the decree of a lower Court to which he is a party and which has been restored.

The N. W. P. Club through G. B. Goyder, Hony. Secy. *v.* **Sadullah**, I. L. R., 20 A. 497. The Secretary orders goods on behalf of a Club. We conceive it is open to the creditor to sue the Secretary person-

ally as a member of the Club for the price. He may sue all the members together or any of them. He cannot sue the Club through the Secretary any more than the Club may sue through the Secretary anybody else. See *Michael* v. *Briggs*, I. L. R., 14 M., 362. For the Club is not a corporation. But we think if the Secretary ordered the goods as the agent of the Club, all the principals being liable (See S. 226 of the Contract Act), it is open to the creditor to select any of the debtors as defendants in the action. The matter appears to us to stand in the same footing as a suit by the creditor of a partnership against any of the partners for recovery of the partnership debt. See *Lukmidas Khimji* v. *Haridas*, I. L. R., 6 B. 700. It would seem to us, therefore, that in the case under notice, though the Club was not liable in an action against the Secretary, the Secretary himself was liable as a member of the Club. The suit was against the succeeding Secretary who took the place of the Secretary that ordered the goods and if this man was a member of the Club at the time the goods were ordered, we fail to see how he can escape the liability.

Har Prasad *v.* **Sheo Ram**, I. L. R., 20 A. 506. Where a decree directs that on failure of the defendant, the mortgagor, the mortgagees were to obtain possession of the property and declares that they are to rema in inpossession until the mortgage-amount was discharged from the usufruct, the Court held that the decree was executed by the mortgagee obtaining possession and that there was nothing more for the executing Court to do. An application for the taking of accounts was dismissed on the ground that there was nothing further to be done by the executing Court and that the proper step was a suit for redemption. A similar construction was placed by the Privy Council in *Sri Raja Papamma Rao* v. *Sri Vira Pratapa, H. V. Ramachandra Razu*, I. L. R., 19 M. 249.

Makbul Fatima *v.* **Lalta Prasad**. I. L. R., 20 A. 523. The decision of the Full Bench does not commend itself to us as sound law. A mortgage-decree expressly directed that the costs were to be paid by the defendant. There seems to be nothing illegal in the passing of such a decree. S. 88 of the Transfer of Property Act, it is said, does not contemplate a personal decree for costs. But the power contained in the Procedure Code is certainly not taken away by S. 88 of the Transfer of Property Act and where that power has been exercised by an award of costs personally against the debtor, the executing Court has no business to whittle that away by treating the provision in the decree as surplusage.

SUMMARY OF RECENT CASES.

Will—Expectant share.—Woman past child-bearing.

In re **Hocking Michell** *v.* **Loe** [1898, II. Ch. D. 567 C. A.]

James Hocking by his will bequeathed certain annuities to his spinster sister A. and to E. L., another sister, the wife of J. L., and provided that, in the event of A. marrying and having children, his estate should vest and be divided equally between the children of A. and E. L., in equal shares, and this was to take place as soon as the youngest of these children should reach the age of 21 years. He further provided that, if A. should remain unmarried, all his property should go to the children of E. L. By a further clause he directed his trustees to raise a portion of the "expectant presumptive or vested share of any child" for B. for his or her support, education, advancement or benefit. In his will he omitted to provide for a contingency which actually happened *viz.*, that of A marrying but having no children.

Kekewich, J., held on a construction of the above will that the testator's residuary estate would, in the event of A. dying without children, remain undisposed of, and, secondly, that the clause empowering the trustees to make advances would cease to operate as soon as A. was proved to be past child-bearing. As at the date of the suit A. had married and become a widow of 54 years of age, he held that the trustees cannot exercise the power above-mentioned. On appeal this judgment was reversed, and the Court of Appeal held that the power of advancement continued in operation during the lifetime of A. They said that Courts ought not to enter into the question of A. being past child-bearing for the purpose of depriving the children of E. L. of the chance of becoming entitled to the property. The Court will never deprive a living person of a possible interest. The Court of Appeal distinguished the case *In re Lowman* (1895, II. Ch., 348) on the ground that no living person was deprived of any interest. In that case a fund was limited by a testator in the event which happened to the sons of his niece L. N. with remainder to the sons of his niece Flora. L. N. was 70 years of age and a spinster. The Court ordered the fund to be paid to Flora's sons during the lifetime of L. N.

Negotiable Instrument—Equitable assignment of debt—Notice.

Bence *v.* **Shearman** [1898, II. Ch., D. 582 C. A.]

The defendant was the owner of a public house, and, being desirous of selling it, employed A. to find him a purchaser in consideration of his

being paid a commission of £175. A. found the plaintiff Bence, who purchased the property from Shearman. A. was indebted to Bence the sum of £175 and shortly before the purchase he had transferred his right to receive the commission to Bence by a stamped document. After the completion of the purchase Shearman received the purchase-money from Bence, and for the commission due to A. gave him a cheque for the amount. Thereupon Bence informed Shearman of the transfer of the commission debt by A. to him and requested him to stop payment of the cheque to A. which Shearman refused. In a suit by Bence against Shearman for the sum, *Held* by the Court of Appeal that the suit ought to be dismissed. Where a man gives his creditor cheque or a promissory note for his debt, and he is afterwards given a notice that the debt, which is the consideration for the instrument, has been assigned apart from it, he can disregard that notice. Their Lordships held that to bind him with such a notice would be to put on him obligations which the law does not recognize and would enable persons to assign the consideration of a Negotiable Instrument in such a way that the debtor is not to pay the holder of the Instrument. To hold the contrary, they said, would be commercially disastrous. Compare *Ramachandra Rao* v. *Kuppusami Aiyar*, 8 M. L. J. 262 and *Patat Ambadi Marar* v. *Krishnan*, I. L. R, 11 M., 290.

Debt—Conditional payment—Effect of giving Cheque or Bill of Exchange.

Felix Hadley & Co. *v.* Hadley [1898, II, Ch. D., 680, per *Byrne*, J.]

The defendant agreed to sell his business as existing on the 31st of December 1887, with the good-will to the plaintiff's company, the latter assuming all the liabilities of the business as and from that date. The sale was to include "all book and other debts due to the vendor in connection with the said business and the full benefit of all security for such debts and of all contracts, engagements, rights and privileges of the vendor in relation to the said business." On December 31, 1887, the defendant had received some bills in payment of debts due to him which, however, had not been honored on that day. The plaintiff's company claimed the benefit of these bills under the clause above stated. *Byrne*, J., held that, as these bills were found to have been subsequently honored, the plaintiff was not entitled to the benefit of these bills under the above clause. For, firstly, the giving of these bills meant a conditional payment of debts for which they were given, the condition being that the bill will be duly honored; so then there were no debts unless these bills were dis-

honored. Secondly, these bills were not securities within the meaning of the above clause. For security means a running security for the debt which exists, and has not been conditionally or unconditionally paid. He held, however, that, if these bills had not been duly honored, the debts would have been revived and the plaintiff can claim them under the above clause.

Winding up of Company—Costs of action commenced before winding up.

In re **London Drapery Stores** [1898, II, Ch. D., 684, per *Wright*, J.]

The London Drapery Stores (Limited) commenced an action against B; but before the action came on for trial the Company went into voluntary liquidation. Subsequently voluntary winding up was ordered to be continued under the supervision of the Court. The voluntary liquidators then obtained the leave of the winding-up Court to continue the action, in which, however, he obtained judgment against the Company for his costs of the action. It was held by *Wright*, J., that, as the liquidators had adopted the action *ab initio* B was entitled to be paid his entire costs; not merely the costs as from the commencement of the winding up.

Master and servant—Liability of hirer for negligence of driver.

Jones *v.* **Scullard** [1898, II Q. B., 565, per *Lord Russell of Killowen*, C. J.]

The defendant was being driven in his brougham when the driver lost control of the horse which bolted and dashed through the window of the plaintiff's shop, doing considerable damage. The plaintiff sued the defendant for his loss which was caused by the negligence of the driver, the defendant's servant. The evidence showed that the brougham, horse, the harness, and the suit of livery which the driver was wearing were the property of the defendant. But the driver was a coachman employed by a livery stable-keeper at whose stables the defendant kept the brougham and the horse. For about a month previous to the date of the accident, the same driver had been driving him under a contract of hire between the defendant and the livery stable-keeper. The horse had been recently bought by the defendant and brought up to London only a week before the accident, and had been driven by the driver in question only three or four times. Under these circumstances, the defendant contended that the driver was not his servant, but that of

the livery stable-keeper, and that the latter was the person to be made liable for the driver's negligence. The Lord Chief Justice held, overruling the contention of the defendant, that the driver, though the general servant of the livery stable-keeper, was in the particular matter in which the accident happened the servant of the defendant, and decreed the plaintiff's suit.

As pointed out by the learned Lord Chief Justice, it is not at all impossible for a man to be in the practical relation of servant to employers. But it is impossible to lay down any definite rule of law on the point. No satisfactory line could be drawn at which, as a matter of law, the general employer of the driver ceases to be responsible and the temporary hirer becomes so. Such case must depend upon its own circumstances. The learned Lord Chief Justice, who exhaustively deals with all the cases on the point, does not himself lay down any definite rule of law. He says: "The principle, then, to be extracted from the cases is that, if the hirer simply applies to the livery stable-keeper to drive him between certain points, or for a certain period of time, and the latter supplies all necessaries for that purpose, the hirer is in no sense responsible for any negligence on the part of the driver. But it seems to me to be altogether a different case where a brougham, the horse, the harness and the livery are the property of the person hiring the services of the driver."

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the receipt of the following publications:—

The Albany Law Journal for December (*in exchange*).
The Calcutta Weekly Notes for December (*in exchange*).
The Allahabad Weekly Notes for December (*in exchange*).
The Green Bag for December (*in exchange*).
The Canadian Law Times for December (*in exchange*).
The Canada Law Journal for December (*in exchange*).
The Educational Review for December (*in exchange*).
The Indian Journal of Education for December (*in exchange*).
The Harvard Law Review for Nov. and Dec. (*in exchange*):

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Recent American decisions.

A person holding a mileage ticket who, with intent to board a train standing on a siding near a station, without going to the station, attempts to cross the main line, is held, in *Southern R. Co.* v. *Smith* (C. C. App. 5th C.) 40 L. R. A. 746, to be not a passenger to whom the

carrier owes extraordinary care or diligence, but only one of the general public entitled to ordinary care, if he has done nothing to notify any of the officers or agents of the carrier that he is a prospective passenger.

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The "heirs" who are entitled to a right of action for the death of a person under 2 Hill's (Wash.) Code, § 138, are held, in *Noble* v. *Seattle* (Wash.) 40 L. R. A. 822, to include the widow and children only, and not to include the parents of the deceased.

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Finding a bee tree on the land of another is held, in *State* v. *Repp* (Iowa) 40 L. R. A. 687, to give the finder no right to the bees or to the tree, and if he hives them and leaves them in a hive and on land, neither of which he owns, he is held to have no interest that can be the subject of larceny. With this case is a collection of the authorities on the subject of property rights in bees.

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Recovery for injuries occasioned by fright, as to which the authorities are conflicting, was recently allowed in *Mack* v. *South Bound* R. *Co.* (S. C.) 40 L. R. A. 679, although there was no physical injury sustained except that caused by the fright.

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An action by a wife against persons who have wrongfully induced her husband to leave her is held, in *Gernerd* v. *Gernerd* (Pa.) 40 L. R. A. 549, to be maintainable where she is free from common-law disablities and entitle to sue in her own name and right for torts done to her. But she is held to have no right of action against her husband's parents for advising him, in good faith, to separate from her.

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The father's duty to maintain a child after divorce, in the absence of any provision in the decree on the subject, is held, in *Re Zilley* (Wis.) 40 L. R. A. 579, to continue as before, and his promise to pay the mother for maintaining a child after the time when he was entitled to have the custody of the child under a decree of divorce granted for the father's fault is implied, although he has ineffectually tried to get the child and has declared that he would not pay the mother for his keeping.

***

An order that the father pay for the support of minor children awarded to the custody of the mother by a divorce decree which made no provision for their maintenance is held, in *McKay* v. *Superior Court* (Cal.) 40 L. R. A. 585, obtainable by petition in the divorce case long after the decree had become final and the mother had re-married.

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An action by a divorced wife against her former husband for the maintenance of a minor child is upheld in *Gibson* v. *Gibson* (Wash.) 40 L. R. A. 597, when the father is found unfit to have the custody of the child, and this has been awarded to her.

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We take the liberty of extracting the following from an article on *The Lawyers* v. *The Rest of Mankind* that appeared in the Albany Law Journal.

* * * * *

Men go into litigation usually blinded by self-interest, passion and prejudice, and their testimony if not given wilfully falsely, is colored and warped by these conditions until its effect, intentional or otherwise, is to produce false effects. And it is often true that those who are loudest in their denunciations of lawyers, when in need of legal talent, are certain to seek the aid of some "shyster" who is held in contempt for dishonest practice by good men of his own profession, and offer him an extra large fee if he will practise his rascality for them. It is the business of the adversary lawyer to detect and expose the knavery of such people. Is there not enough in all this to make them sceptical of men's honesty and tempt them to practise the dishonest arts with which they are charged? But it is true that the great majority of lawyers scorn the temptations, and will stand higher tests as to integrity of purpose as a class, all things considered, than any other class. They see the worst side of humanity all the time. Whilst it is true that continuous contact with vice tends to dull the sharp appreciation of it, yet the lawyer being of necessity ever on the alert to detect and defeat the dishonest schemes of parties and witnesses, learns to know the futility of dishonesty. "It is said a lawyer ought to be a gentleman," but there is certainly no greater obligation on him to be a gentleman than on those who go into Courts as parties and submit their contentions. And as to all charges of "brow-beating," "bullying," etc., the writer has heard them repeated for years, and yet has rarely seen anything of the sort resorted to, unless provoked by the conduct of the party or witness. The person who goes into Court and conducts himself in an honest, straight-forward and respectful manner is very rarely disturbed by lawyers. The experienced lawyer, if he have ordinary judgment, knows better than to brow-beat or attempt to entrap the truthful witness, well knowing that all such efforts invariably injure his cause, prejudices Courts, jury and the public. It is also said the disreputable classes [should be debarred; granted, But to disbar the class of disreputable men who assume to be lawyers is easier advised than done. No one feels greater

contempts for such characters and greater humiliation that a great and honored profession should be disgraced by the ignorant and dishonest charlatans than the lawyer. But the profession is, to a great degree, powerless. They do not make the laws governing the admission to the bar, and the people resent any effort at restrictions, fearing that the Bar would become an aristocracy and would obtain too much influence and power. A lawyer, in practice, cannot afford to have controversies with the disreputable by instituting proceedings for disbarment, however much he may dislike the creatures. It is not so much a matter of interest to him as to the general public, and yet he sees the public constantly employing and paying well the pettifogger for the very conduct that would be cause for disbarment, and hears the dear public boast of how this or that "sharp" got them out of their "scrapes." The Bench could do much to rid the Bar of disreputable practices, but not so much as it should have the power to do. As to the objection made that the swindlers who speculate off the ignorant and unwary in cities always have the best legal talent to defend them, the Bar is in no wise responsible for this difficulity. The law gives no adequate remedies. The same men who do the swindling manipulate the political primaries and lobby the legislative bodies in which the able lawyer, who is competent to draft laws that would surely circumvent the swindler, is a *rara avis*.

When the respectable portion of community becomes willing to take an interest in these matters, and willing that lawyers may be paid a salary that will pay board at least, and see then that they are nominated and elected law-makers, there will be hope for legistative action which will meet all these causes of complaint, as well as many others. But while inexperienced young men and broken-down old men and ignorant politicians, who go for what they can make out of it, are legislators, no hope need be entertained for improvement in this or any other direction where abuses prevail.

Under the English common law, before a man could be admitted to the Bar, he was compelled to spend a number of years in study and preparation for the profession and pass rigid examinations. The rule that men shall produce evidence of having studied law and pass examinations, more or less rigid, prevails in most of the States. That examinations were and are often farcical is evidenced by many a story, more or less veracious, similar to this: The Committee appointed to examine the candidate asked, "Who made you?" The answer came quickly, "God, of course." "Who made God?" "I don't know." The Committee reported favourably, adding that the candidate had answered correctly

all questions asked but one, and that one the Committee could not answer. Law schools were lax in the matter of both instructions and examinations. But there has been rapid improvement. The necessity for better things has become apparent to the better class of lawyers, as a defence against the unfit. Many of the States are becoming more exacting in the matter of qualifications. The American Bar Association, which is really international, State and other Bar associations are pressing upon the profession and the country the necessity for high standards for men and qualifications. In all the States it is required that an applicant for admission to the Bar shall be a voter. But in this and some of the other States women are now admitted. I think Vigo County had the first woman lawyer admitted in the State, through the chivalry of a valued member of this Club.

But in the adoption of the State Constitution of 1852 the Constitutional Convention brought ridicule and disgrace upon the State, adding to its unmerited reputation for illiteracy by adopting as a part of the Constitution the following monstrous absurdity: "Every person of good moral character, being a voter, shall be entitled to admission to practise law in all courts of justice."

Evidently the members of that convention all wanted to practise law themselves, and knew their unfitness under any reasonable rule of preparation. * * * It has been supposed that under this provision the Courts had no power to regulate admission to the Bar, but later and better opinions now prevail. There is a saving clause in that constitutional absurdity. It requires a person to be of "good moral character." But what is good moral character? To a profane, dissolute, dishonest Judge, whom the "rest of mankind" entitled to vote have foisted upon a long-suffering profession, the requisites of a good moral character are such as will enable the candidate to keep pace with "his honor." Good moral character is a thing too elastic to hold any man to truth and honesty. It has as varied meaning as there are individuals. It will no doubt be said that as used here it means a consensus of opinions, or a sort of average. But when the question as to whether or not a person possesses such qualifications has to be submitted to a Court or jury upon evidence, it will vary as those interpreters vary in their judgment of what constitutes good moral character. In fact, there is no fixed or stable standard, and the saving clause amounts to nothing. And the profession in Indiana has had to suffer, and with them every citizen. The citizen ordinarily is not able to distinguish between the quack or charlatan and the reputable physician, and he is less able to recognize

the distinguishing marks of the shyster, barator, etc. Though I met a poor woman, a few days ago, who knew the shyster when she met him. The reptile had heard that she thought of getting a divorce from a husband who had abandoned her with two children five years ago, and he visited her, uninvited, several times, and urged her to employ him. She declined to yield to his blandishments. There has a new variety appeared (in this region), who partakes of the nature of the vulture. A man gets hurt whilst in the employ of some corporation; this bird will scent the carcass afar, and be sitting on the fence near by before the blood is washed off, and beg for a job to black-mail the employer, and if successful in getting the job, will take most of what he gets for his alleged services.

Again, he hears that some man is likely to die, it may be twenty miles away. He flies to the place, and hovering over the deathbed urges the dying to employ him to administer the estate. I heard of two of these foul birds flying a race, not long since, for such a chance. The defeated bird was badly disgusted. But, as I have said, these reptiles and vultures are not numerous, and, if the community would use reasonable intelligence and honesty in the choice of their counsellors, they would starve to death.

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Use of French Language in an English Court: The action of Mr. Justice Darling in sentencing a French prisoner in an English criminal Court in his own language is being somewhat sharply criticised by the legal press, on the ground that it is contrary to tradition and precedent, for the obvious reason that the sentence should be understood of the people, and further, that Judges are not and cannot be versed in the language of every foreigner tried before them, whether Chinese, Turk, Russian, Italian or French. An additional, and perhaps even more forcible, reason is that advanced by a correspondent of the *Law Times*, *viz.*, that the sentence, so as to admit of its becoming part of the record of the trial, should have been delivered in the English language. The learned Judge should have first delivered the sentence in English, and then, if he thought proper, he could have interpreted it to the prisoner in French, or ordered the Court interpreter to do so. This correspondent points out that since the time of Edward III., the English tongue has taken the place of French in the Courts of law, and, although the language in the statutes prior to the reign of Richard III. is generally in Latin or French, all Richard III.'s statutes are in English, and so they have continued to be drawn in all subsequent periods. But the whole matter may be said to possess little more than academic

interest, particularly for the poor devil in the prisoner's box, unless, indeed, there is something in the suggestion of a London contemporary that, unless the learned Judge's dialect was immaculate, the procedure constituted a wholly unjustifiable addition to the penalty imposed upon the prisoner.—*The Albany Law Journal.*

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The Joint Traffic Decision:—The Supreme Court of the United States, in the Joint-Traffic case, to which we made reference last week, refused to reverse itself. If consistency is a jewel noted for its rarity, then the legal profession and the commercial world ought to rejoice that the highest Court in the land has refused to be inconsistent. Mr. Justice Peckham's declaration that the Court had been unable to distinguish any difference between the Joint-Traffic case and the Trans-Missouri case really covers the whole matter in a nutshell. We believe that a careful and dispassionate investigation of the controversy and the facts involved will show that the Supreme Court is clearly right in declaring the Joint-Traffic Association illegal under the Interstate Commerce Act and the Anti-Trust Law. The thirty-two railroads embraced in it, including all of the great transportation lines operating east of the Mississippi and north of the Ohio, organized in October 1895, and had some of the ablest counsel in the country to guide them. In view of numerous decisions, whose force and effect it sought to evade, it did not "make" rates, but merely "recommended" them. The rates themselves, we are told, were fixed by the companies concerned. We are also informed by the Philadelphia Press, that the object of the Association was not to advance rates, but to maintain them; that the board of control of nine, the board of three commissioners or managers, and the three arbitrators were only "advisory," the companies themselves being the final and only actual authority. Each company collected its own rates and made its own rates. The differentials by which these rates were kept uniform were determined by the managers, passed upon by the arbitrators, and affirmed by the board of control, but the companies, we are assured, in the end made the rates. It is added: "Under this simple but carefully devised plan 'agreements' as to rates were avoided, 'pools' were eschewed and the delegation of corporate powers was guarded against. The railroads were, it was argued, simply provided with suitable machinery by which each could be advised as to the fairest rate, all things considered, and, having learned this rate, each agreed on its own account and in its own interest to maintain it, and, having reached this conclusion, forfeited £5,000 if it failed to keep the rate." Justice Peckham, in his characteristically vigorous way, brushes aside the varnish of

sophistry with which shrewd counsel sought to cover the tell-tale joints in their handiwork, and frankly declares the inability of the Court to distinguish any difference between the agreement under consideration and the one set forth in the Trans-Missouri case; in other words, it was another instance of tweedledum and tweedledee. The natural and direct effect of the two agreements, the Court declares, was the same, *viz.* to maintain rates at a higher level than would otherwise prevail, and hence the differences between them were not such as to call for different judgments in the two cases on any such grounds. It must be conceded, it seems to us, that in both cases there was an agreement—no matter by what particular process it was reached—to keep up rates, and that being the fact, competition was not allowed its natural scope and effect. It will not do to say that under the operation of the Joint-Traffic Association rates were reasonable and just; that the cost of transportation being such a large element in the price of goods, it is quite as important to have rates uniform and stable as to have them low (of course, rates both stable and low would be still better), and that when rates are being cut right and left, it is the big shipper who obtains advantage over the little one. The disastrous results that frequently accompany over-competition may be conceded, at the same time it may well be doubted whether they are comparable to the evils of monopolistic regulation of rates. Under the operation of immutable and beneficent laws, the former evils will correct themselves, in time, through the "survival of the fittest," but with rates arbitrarily fixed by the transportation companies themselves there is always a liability to tax the traffic all it will bear rather than what would be fair and not a reasonable profit to the companies, to say nothing of the over-capitalization and dishonest management features. We are aware that the English Courts of last resort have for years held the view that agreements to maintain rates by common carriers are not in restraint of trade. It was decided in the "Mogul freight cases," in effect, that trade is impossible unless men bargain freely, and that men cannot bargain freely, unless they are free to decide when and how to bargain. From the English Court's view that it is practically impossible to discriminate between individual and collective bargaining, and that both must be left free if freedom is to be retained by each, we most respectfully dissent. We venture the assertion that every Joint-Traffic Association ever organized was compelled to depend for success upon its ability to coerce certain of its members into compliance with the rules and rates agreed upon, as is shown by the system of fines and penalties imposed upon violators, and free action is hardly compatible with coercion, however cunningly it may be disguised by shrewd and clever counsel.

On the general effect of the decision, the Philadelphia Press remarks: "The Supreme Court decision establishes the law. It must be obeyed without evasion, and will be. The experiment of extreme competition must now be carried to the end. Both Congress and the Courts have decided upon this, and while yesterday's decision should lead to a pooling act, there is grave danger that it will not. Last winter the railroads, secure in successive decisions in their favor, ceased to urge the enactment of the measure for which they had earlier clamored. A new campaign must now be begun with the present decision against it. Such an act should be passed, for, while the law and the Courts are against the regulation of competition, public policy is the other way. It is only necessary to contrast the stable, profitable and secure English railroad and industrial corporations under a system permitting and fostering pooling and our own without this safeguard for labor, trade and capital. The bankruptcies, the 'reorganizations' and the drastic economies of unrestricted competition work untold hardship to labor by rendering employment precarious, derange industry and destroy capital. The attempt to prevent any regulation in competition plunged over one-third of our railroads in the hands of receivers and for six years stopped the growth of our railroad system. Why should men invest in railroads whose very existence can at any time be put in jeopardy by reckless competition?

"By its decision the Supreme Court has at least cleared away all doubt and carried the system of destructive competition to its final term and last extreme. Railroads are left to cut and harry regardless of returns, and it is possible that worse must be before better can be had. It is at least true that the current decision has come when railroad managers have been demonstrating that even the Joint-Traffic Association cannot prevent destructive cutting in rates by respectable corporations and reputable managers." It may be conceded that the Joint-Traffic Association, cunningly devised as it was, being illegal, no joint action between railroads is possible without additional legislation. To this end the railroad managers will doubtless address themselves at once, and their activity is likely to take the form of an attempt to induce Congress, at the earliest possible moment, to pass a law permitting the railways to organize and conduct traffic organizations under the supervision of the Interstate Commerce Commission.

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Legal Laughs.

A lawyer in Court the other day, after a close cross-examination of a witness, an illiterate Irish-woman, in reference to the position of the

doors and windows, etc., in her house, asked the following question: "And now, my good woman, tell the Court how the stairs run in your house." To which the good woman replied: "How do the sthairs run? Shure, whin I'am opp sthairs they run down, and whin I'am down they run opp."—Household Words:—*The Albany Law Journal.*

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Horace Greeley—he used to tell the story himself—once sent a claim to a western attorney for collection, the attorney to keep half the amount for his fee. After a time Mr. Greeley received the following note from the lawyer:—

"*Dear Sir*:—I have succeeded in collecting *my half* of that claim. The balance is hopeless."—*The Albany Law Journal.*